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1 UNITED STATES PATENT AND TRADEMARK OFFICE

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4 BEFORE THE BOARD OF PATENT APPEALS  
5 AND INTERFERENCES  
6

7  
8 *Ex parte* MARY L. MCDANIEL, HERB F. VELAZQUEZ  
9 and WILLIAM REEVES  
10

11  
12 Appeal 2009-1047  
13 Application 10/732,925  
14 Technology Center 3600  
15

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17 Decided:<sup>1</sup> April 27, 2009  
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20 Before WILLIAM F. PATE, III, JENNIFER D. BAHR, and  
21 FRED A. SILVERBERG, *Administrative Patent Judges*.

22  
23 SILVERBERG, *Administrative Patent Judge*.  
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25  
26 DECISION ON APPEAL

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<sup>1</sup> The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

1 STATEMENT OF THE CASE

2 Appellants appeal under 35 U.S.C. § 134 (2002) from a rejection of  
3 claims 1-18 and 20-32, which are all of the pending claims. Claim 19 has  
4 been canceled. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

5  
6 SUMMARY OF DECISION

7 We REVERSE.

8 THE INVENTION

9 The Appellants' claimed invention is directed to a portable carrying  
10 case for storing and dispensing absorbent articles such as feminine care  
11 articles (Spec.1:1-3 and Spec.4:32-Spec.5:6). Claim 1, reproduced below, is  
12 representative of the subject matter on appeal.

- 13 1. A portable carrying case for personal care absorbent  
14 articles, comprising:  
15 a body, said body defining an internal enclosure for  
16 receipt of a plurality of stacked personal care absorbent articles,  
17 said body configured with an exterior surface that is  
18 ergonomically shaped to generally conform to being carried and  
19 held in one hand of the user while the user's other hand removes  
20 an article from the internal enclosure;  
21 an opening defined in said body at a location so as to at  
22 least partially expose an upper one of said absorbent articles for  
23 dispensing without generally exposing underlying absorbent  
24 articles;  
25 a lid movably disposed relative to said body from a  
26 closed position wherein said opening is covered by said lid to  
27 an open position wherein access is provided to said absorbent  
28 articles through said opening; and  
29 a manual push structure defined in said body generally  
30 opposite from said opening, said push structure configured to  
31 allow a user to push on the bottommost one of said stacked  
32 absorbent articles so as to move the uppermost one of said stack

of absorbent articles towards said opening for grasping and  
retrieval by the user.

#### THE REJECTIONS

The Examiner relies upon the following as evidence of  
unpatentability:

Yamada	US 5,704,471	Jan. 6, 1998
Pehr	US 6,349,849 B1	Feb. 26, 2002
Amundson	US 6,604,651 B2	Aug. 12, 2003
Borrero	US 6,799,695 B1	Oct. 5, 2004

The following rejections<sup>23</sup> by the Examiner are before us for review:

1. Claims 1-18 and 20-32 under 35 U.S.C. § 112, first paragraph, as based on a disclosure which is not enabling.
2. Claims 1-18 and 20-32 under 35 U.S.C. § 112, second paragraph, as being indefinite.
3. Claims 1-5, 7, 8, 11-13 and 16-18 are rejected under 35 U.S.C. § 102(4) as being as being anticipated by Borrero.
4. Claim 6 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Borrero in view of Yamada.
5. Claim 9 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Borrero in view of Pehr.

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<sup>2</sup> The Grounds of Rejection section of the Examiner's Answer (Ans. 3) stated that claim 19 was rejected under 35 U.S.C. § 112, first paragraph, however, claim 19 was canceled in a communication filed July 19, 2006. Accordingly, claim 19 is not involved in this appeal.

<sup>3</sup> The rejections of claim 32 under 35 U.S.C. § 102(e); and claims 14, 15, 20-31 under 35 U.S.C. § 103(a) as set forth in the Final Rejection mailed October 13, 2006 (Final Rejection 10-17) have been withdrawn (Ans. 2-3).

6. Claim 10 is rejected under 35 U.S.C. § 103(a) (2004) as being unpatentable over Borrero in view of Pehr and further in view of Amundson.

## ISSUES

The issues before us are whether the Appellants have shown that the Examiner erred in rejecting claims 1-18 and 20-32 under 35 U.S.C. § 112, first paragraph; claims 1-18 and 20-32 under 35 U.S.C. § 112, second paragraph; claims 1-5, 7, 8, 11-13 and 16-18 over Borrero; claim 6 over Borrero in view of Yamada; claim 9 over Borrero in view of Pehr; and claim 10 over Borrero in view of Pehr and further in view of Amundson. These issues turn on whether: (1) Appellant's Specification describes the invention so as to enable a person of ordinary skill in the art to make and/or use the invention claimed in claims 1-18 and 20-32; (2) claims 1 and 20 are definite; (3) Borrero discloses a body configured with an exterior surface that is ergonomically shaped to generally conform to being carried and held in one hand of the user while the user's other hand removes an article from the internal enclosure as called for in claims 1 and 20; and (4) Borrero discloses an opening defined in a front wall and a manual push structure defined in the back wall as called for in claim 20.

## FINDINGS OF FACT

We find that the following enumerated findings are supported by at least a preponderance of the evidence. *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Office).

- 1        1.        Borrero discloses a sanitary napkin dispenser 10 comprising a  
2                housing 20; the housing 20 having a front side 22, a bottom side 28  
3                and a rear side 30; a lid 32 secured to the top side of the housing by  
4                a hinge 34; the hinge having a lid latch 36; a spring 42 attached to  
5                the lid; a plate 44 attached to the spring 42 to maintain pressure on  
6                the sanitary napkins to assure proper orientation and positioning  
7                when the lid is closed and the napkins are removed (col. 5, ll. 15-  
8                26), a side access hole 48 on the front side 22 providing hand  
9                access for removing a sanitary napkin from the bottom of the  
10              housing 20; and a door 46 for sealing the housing until access is  
11              desired (col. 5, ll. 34-40) (fig. 6).
- 12        2.        Borrero further discloses that the housing can either be mounted on  
13                a wall (col. 4, l. 58) or be free standing (col. 6, ll. 8-9), wherein the  
14                housing is sized to store a sizable number of sanitary napkins 12  
15                (col. 4, ll. 61-62).
- 16        3.        Borrero still further discloses a hook 52 attached to the housing  
17                bottom side 28 for mounting a disposal bag 14 (col. 5, ll. 53-60).
- 18        4.        Borrero still further discloses that the door and the access hole may  
19                be positioned on the left side 24, right side 26 or a combination of  
20                two or more of the front, left or right sides of the housing (col. 5,  
21                ll. 45-52).
- 22        5.        Yamada discloses a portable wet tissue dispenser (col. 1, ll. 4-8)  
23                having a slidable lid for covering or uncovering a tissue dispensing  
24                opening (col. 4, ll. 42-44).
- 25        6.        Pehr discloses a tissue dispenser 1 having slots (an access opening)  
26                34, 35 that are covered by thin plastic layers 46, 47, wherein the

thin plastic layers 46, 47 have central slits 49, 50 and are sufficiently elastic to allow a user to extend their hand through the slits to withdraw a tissue (col. 3, ll. 54-64).

7. Amundson discloses a storage and dispensing package 20 for wipes having a non-rigid container 30 with a non-rigid baffle structure 110 (fig. 5); either the container 30 or the baffle structure can be transparent, translucent or opaque; wherein when the container 30 is transparent the user can determine the quantity of wet wipes remaining in the package 20 (col. 11, l. 66-col. 12, l. 8).

8. The ordinary meaning of the word “ergonomics” includes “an applied science concerned with designing and arranging things people use so that the people and things interact most efficiently and safely.” *Merriam-Webster’s Collegiate Dictionary* (10<sup>th</sup> ed. 1996).

9. The ordinary meaning of the word “conform” includes “to give the same shape, outline, or contour to.” *Merriam-Webster’s Collegiate Dictionary* (10<sup>th</sup> ed. 1996).

10. The ordinary meaning of the word “circumference” includes “the external boundary or surface of a figure or an object: periphery.” *Merriam-Webster’s Collegiate Dictionary* (10<sup>th</sup> ed. 1996).

## PRINCIPLES OF LAW

“[T]o be enabling, the specification of a patent must teach those skilled in the art how to make and use the full scope of the claimed invention without ‘undue experimentation.’” *In re Wright*, 999 F.2d 1557, 1561 (Fed. Cir. 1993).

1       Some experimentation, even a considerable amount, is not “undue” if,  
2 e.g., it is merely routine, or if the specification provides a reasonable amount  
3 of guidance as to the direction in which the experimentation should proceed.  
4 *In re Wands*, 858 F.2d 731, 737 (Fed. Cir. 1988).

5       Factors to consider include “(1) the quantity of experimentation  
6 necessary, (2) the amount of direction or guidance presented, (3) the  
7 presence or absence of working examples, (4) the nature of the invention, (5)  
8 the state of the prior art, (6) the relative skill of those in the art, (7) the  
9 predictability or unpredictability of the art, and (8) the breadth of the  
10 claims.” *Id.* at 737.

11       The test for definiteness under 35 U.S.C. § 112, second paragraph, is  
12 whether “those skilled in the art would understand what is claimed when the  
13 claim is read in light of the specification.” *Orthokinetics, Inc. v. Safety*  
14 *Travel Chairs, Inc.*, 806 F.2d 1565, 1576 (Fed. Cir. 1986) (citations  
15 omitted).

16               Definiteness problems often arise when words of  
17 degree are used in a claim. That some claim  
18 language may not be precise, however, does not  
19 automatically render a claim invalid. When a word  
20 of degree is used the [factfinder] must determine  
21 whether the patent's specification provides some  
22 standard for measuring that degree. The  
23 [factfinder] must decide, that is, whether one of  
24 ordinary skill in the art would understand what is  
25 claimed when the claim is read in light of the  
26 specification.

27       *Seattle Box Co. v. Indust. Crating & Packing, Inc.*, 731 F.2d 818, 826  
28 (Fed. Cir. 1984) (affirming the trial court’s determination that an expert  
29 would know the limitations of the claims because the specification clearly  
30 sets forth a standard for measuring the degree used in the claim language).



1 Even if a person of ordinary skill would need to experiment so as to  
2 determine the limits of a patent's claims, the claims would not be invalid  
3 under section 112. *See, e.g., W.L. Gore & Associates, Inc. v. Garlock, Inc.*,  
4 721 F.2d 1540, 1557 (Fed. Cir. 1983).

5 Appellants have the burden on appeal to the Board to demonstrate  
6 error in the Examiner's position. *See In re Kahn*, 441 F.3d 977, 985-86  
7 (Fed. Cir. 2006) ("On appeal to the Board, an applicant can overcome a  
8 rejection [under § 103] by showing insufficient evidence of *prima facie*  
9 obviousness or by rebutting the *prima facie* case with evidence of secondary  
10 indicia of nonobviousness.") (quoting *In re Rouffet*, 149 F.3d 1350, 1355  
11 (Fed. Cir. 1998)).

12 Anticipation is established only when a single prior art reference  
13 discloses, expressly or under the principles of inherency, each and every  
14 element of a claimed invention. *RCA Corp. v. Applied Digital Data Sys.,*  
15 *Inc.*, 730 F.2d 1440, 1444 (Fed. Cir. 1984). In other words, there must be no  
16 difference between the claimed invention and the reference disclosure, as  
17 viewed by a person of ordinary skill in the field of the invention. *Scripps*  
18 *Clinic & Research Found. v. Genentech Inc.*, 927 F.2d 1565, 1576 (Fed. Cir.  
19 1991). It is not necessary that the reference teach what the subject  
20 application teaches, but only that the claim read on something disclosed in  
21 the reference, i.e., that all of the limitations in the claim be found in or fully  
22 met by the reference. *Kalman v. Kimberly-Clark Corp.*, 713 F.2d 760, 772  
23 (Fed. Cir. 1983), cert. denied, 465 U.S. 1026 (1984).

24 "Section 103 forbids issuance of a patent when 'the differences  
25 between the subject matter sought to be patented and the prior art are such  
26 that the subject matter as a whole would have been obvious at the time the

1 invention was made to a person having ordinary skill in the art to which said  
2 subject matter pertains.’” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 406  
3 (2007). The question of obviousness is resolved on the basis of underlying  
4 factual determinations including (1) the scope and content of the prior art,  
5 (2) any differences between the claimed subject matter and the prior art, (3)  
6 the level of skill in the art, and (4) where in evidence, so-called secondary  
7 considerations. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). *See*  
8 *also KSR*, 550 U.S. at 406-407 (“While the sequence of these questions  
9 might be reordered in any particular case, the [*Graham*] factors continue to  
10 define the inquiry that controls.”)

11 In *KSR*, the Supreme Court stated that “when a patent claims a  
12 structure already known in the prior art that is altered by the mere  
13 substitution of one element for another known in the field, the combination  
14 must do more than yield a predictable result (citing *United States v. Adams*,  
15 383 U.S. 39 S. Ct. 708 (1966)). *Id.* at 416.

16 In *KSR*, the Supreme Court stated that “[o]ften, it will be necessary for  
17 a court to look to interrelated teachings of multiple patents; the effects of  
18 demands known to the design community or present in the marketplace; and  
19 the background knowledge possessed by a person having ordinary skill in  
20 the art, all in order to determine whether there was an apparent reason to  
21 combine the known elements in the fashion claimed by the patent at issue.”  
22 *Id.* at 418. The Court noted that “[t]o facilitate review, this analysis should  
23 be made explicit.” *Id.* (citing *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)  
24 (“[R]ejections on obviousness grounds cannot be sustained by mere  
25 conclusory statements; instead, there must be some articulated reasoning  
26 with some rational underpinning to support the legal conclusion of

1 obviousness’’)). However, “the analysis need not seek out precise teachings  
2 directed to the specific subject matter of the challenged claim, for a court  
3 can take account of the inferences and creative steps that a person of  
4 ordinary skill in the art would employ.” *Id.*

5 When construing claim terminology in the United States Patent and  
6 Trademark Office, claims are to be given their broadest reasonable  
7 interpretation consistent with the specification, reading claim language in  
8 light of the specification as it would be interpreted by one of ordinary skill in  
9 the art. *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir.  
10 2004).

11 Where the proposed modification would render the prior art invention  
12 being modified unsatisfactory for its intended purpose, the proposed  
13 modification would not have been obvious. *Tec Air Inc. v. Denso Mfg.*  
14 *Michigan Inc.*, 192 F.3d 1353, 1360 (Fed. Cir. 1999).

15  
16 ANALYSIS

17 *35 U.S.C. § 112, First Paragraph, Rejection*

18 The Examiner contends that the limitation “said body configured with  
19 an exterior surface that is ergonomically shaped to generally conform to  
20 being carried and held in one hand of the user ...” as called for in claims 1  
21 and 20 is not enabling (Ans. 4 and 10-12). “[T]o be enabling, the  
22 specification of a patent must teach those skilled in the art how to make and  
23 use the full scope of the claimed invention without ‘undue  
24 experimentation.’” *In re Wright* at 1561. We agree with Appellants that the  
25 targeted community of users is the adult female population and further find  
26 that an appreciation of the range of sizes of female hands is within the realm  
27 of a person having ordinary skill in the art (Br. 11-12). The ordinary

1 meaning of the word “ergonomics” includes “an applied science concerned  
2 with designing and arranging things people use so that the people and things  
3 interact most efficiently and safely” (Fact 8). The ordinary meaning of the  
4 word “conform” includes “to give the same shape, outline, or contour to”  
5 (Fact 9). Merriam-Webster’s Collegiate Dictionary (10th ed. 1996). We  
6 agree with Appellants (Br. 14-15) and find that the words “configured with  
7 an exterior surface that is ergonomically shaped to generally conform to  
8 being carried and held in one hand of the user while the user's other hand  
9 removes an article from the internal enclosure” means that the exterior  
10 surface of the body must be designed and arranged to interact with people  
11 most efficiently and safely, and have a shape that allows the body to be  
12 carried and held in one hand while the user's other hand removes an article  
13 from the internal enclosure. Therefore, we conclude that since the targeted  
14 community of users is the adult female population, a person having ordinary  
15 skill in the art at the time the invention was made would understand  
16 sufficiently the size and shape of the body as called for in claims 1 and 20,  
17 and claims 2-18 and 21-32 which depend respectively therefrom, and would  
18 understand sufficiently how to make and use the full scope of the invention  
19 without undue experimentation. Therefore, we conclude that the Examiner  
20 erred in rejecting claims 1-18 and 20-32 under 35 U.S.C. § 112, first  
21 paragraph. We reverse the rejection of claims 1-18 and 20-32 under 35  
22 U.S.C. § 112, first paragraph, as being based upon a disclosure which is not  
23 enabling.

24

1     *35 U.S.C. § 112, Second Paragraph, Rejection*

2             The Examiner contends that the claims are indefinite since it is  
3     unclear what is meant by an ergonomically shaped exterior and what is  
4     meant by the words generally conform as called for in claims 1 and 20. For  
5     the reasons set forth above in our discussion of the rejection of the claims  
6     under 35 U.S.C. § 112, first paragraph, we conclude that since the targeted  
7     community of users is the adult female population, a person having ordinary  
8     skill in the art would understand what is meant by an ergonomically shaped  
9     exterior and what is meant by the words generally conform as called for in  
10    claims 1 and 20 and claims 2-18 and 21-32 which depend respectively  
11    therefrom. Therefore, we conclude that the Examiner erred in rejecting  
12    claims 1-18 and 20-32 under 35 U.S.C. § 112, second paragraph. We  
13    reverse the rejection of claims 1-18 and 20-32 under 35 U.S.C. § 112,  
14    second paragraph, as being indefinite.

15  
16    *Prior Art Rejections*

17            Borrero discloses a sanitary napkin dispenser 10 comprising a housing  
18    20; the housing 20 having a front side 22, a bottom side 28 and a rear side  
19    30; a lid 32 secured to the top side of the housing by a hinge 34; the hinge  
20    having a lid latch 36; a spring 42 attached to the lid; a plate 44 attached to  
21    the spring 42 to maintain pressure on the sanitary napkins to assure proper  
22    orientation and positioning when the lid is closed and the napkins are  
23    removed (col. 5, ll. 15-26), a side access hole 48 on the front side 22  
24    providing hand access for removing a sanitary napkin from the bottom of the  
25    housing 20; and a door 46 for sealing the housing until access is desired (col.  
26    5, ll. 34-40) (fig. 6) (Fact 1). Appellants contend that Borrero's dispenser 10  
27    is not "configured with an exterior surface that is ergonomically shaped to

1 generally conform to being carried and held in one hand of the user while  
2 the user's other hand removes an article from the internal enclosure” as  
3 called for in claims 1 and 20 (Br. 17). Appellants further contend that  
4 Borrero is configured not to be carried and held in one hand, but to be  
5 mounted on a wall (Br. 17). As we previously found in our discussion of the  
6 rejection of claims under 35 U.S.C. § 112, first paragraph, the words  
7 “configured with an exterior surface that is ergonomically shaped to  
8 generally conform to being carried and held in one hand of the user while  
9 the user's other hand removes an article from the internal enclosure” means  
10 that the exterior surface of the body must be designed and arranged to  
11 interact with people most efficiently and safely, and have a shape that allows  
12 the body to be carried and held in one hand while the user's other hand  
13 removes an article from the internal enclosure. Borrero’s housing can either  
14 be mounted on a wall (col. 4, l. 58) or be free standing (col. 6, ll. 8-9), and is  
15 sized to store a sizable number of sanitary napkins 12 (col. 4, ll. 61-62) (Fact  
16 2). Therefore, we find that a person having ordinary skill in the art would  
17 not view Borrero’s housing as being sized and shaped to be held in one  
18 hand. Additionally, a person having ordinary skill in the art would not look  
19 to resize and reshape Borrero’s housing to be conformed to the hand since  
20 Borrero’s housing would then not be able to store a sizable number of  
21 sanitary napkins and not be able to placed on a counter. Further, Borrero  
22 discloses a hook 52 attached to the dispenser housing (Fact 3). Therefore,  
23 we find that while one could hold Borrero’s housing by the hook 52 in one  
24 hand, the hook is not part of the body of the dispenser. Accordingly, we do  
25 not agree with the Examiner’s analysis (Ans. 5) and find that Borrero’s  
26 dispenser 10 is not “configured with an exterior surface that is

1 ergonomically shaped to generally conform to being carried and held in one  
2 hand of the user while the user's other hand removes an article from the  
3 internal enclosure" as called for in claims 1 and 20, and claims 2-18 and 21-  
4 32 depending respectively therefrom. Additionally, regarding claim 20, the  
5 Examiner contends that in Borrero the opening in the front wall is Borrero's  
6 opening 48, and the manual push structure is Borrero's lid 32 and spring 42  
7 (Ans. 6). Borrero's lid 32 and spring 42 are mounted on the housing's top  
8 side (fig. 6) (Fact 1). Borrero's access hole 48 may be mounted on the  
9 housing's front side (Fact 1), left side 24 or right side 26 (Fact 4).  
10 Therefore, Borrero's lid is not mounted on a wall opposite the access hole.  
11 Accordingly, Borrero does not disclose an opening on the front wall and a  
12 manual push structure in the back wall as called for in claim 20. Further, the  
13 Examiner has not relied on Yamada, Pehr or Amundson for any teaching  
14 that would remedy the deficiencies in Borrero. Therefore, we conclude that  
15 the Examiner erred in rejecting claims 1-5, 7, 8, 11-13 and 16-18 over  
16 Borrero; claim 6 over Borrero in view of Yamada; claim 9 over Borrero in  
17 view of Pehr; and claim 10 over Borrero in view of Pehr and further in view  
18 of Amundson. We reverse the rejection of claims 1-5, 7, 8, 11-13 and 16-18  
19 under 35 U.S.C. § 102, and claims 6, 9 and 10 under 35 U.S.C. § 103.

## 21 CONCLUSIONS OF LAW

22 We conclude that the Appellants have shown that the Examiner erred  
23 in rejecting claims 1-18 and 20-32 under 35 U.S.C. § 112, first paragraph, as  
24 based on a disclosure which is not enabling; claims 1-18 and 20-32 under 35  
25 U.S.C. § 112, second paragraph, as being indefinite; claims 1-5, 7, 8, 11-13  
26 and 16-18 under 35 U.S.C. § 102(e) as being anticipated by Borrero; claim 6

1 under 35 U.S.C. § 103(a) as being unpatentable over Borrero in view of  
2 Yamada; claim 9 under 35 U.S.C. § 103(a) as being unpatentable over  
3 Borrero in view of Pehr; and claim 10 under 35 U.S.C. § 103(a) as being  
4 unpatentable over Borrero in view of Pehr and further in view of Amundson.

5  
6 **DECISION**

7 The decision of the Examiner to reject claims 1-18 and 20-32 under  
8 35 U.S.C. § 112, first paragraph; claims 1-18 and 20-32 under 35 U.S.C. §  
9 112, second paragraph; claims 1-5, 7, 8, 11-13 and 16-18 over Borrero;  
10 claim 6 over Borrero in view of Yamada; claim 9 over Borrero in view of  
11 Pehr; and claim 10 over Borrero in view of Pehr and further in view of  
12 Amundson is reversed.

13  
14 **REVERSED**  
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Appeal 2009-1047  
Application 10/732,925

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